

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7156

Amended Petition of UPC Vermont Wind, LLC, for a )  
Certificate of Public Good, pursuant to )  
30 V.S.A. § 248, authorizing the construction and )  
operation of a 40 MW wind electric generation facility, )  
consisting of 16 wind turbines, and associated )  
transmission and interconnection facilities, in Sheffield )  
and Sutton, Vermont, to be known as the "Sheffield )  
Wind Project" )

Order entered: 2/11/2011

**ORDER DENYING MOTION TO ALTER**

On September 20, 2010, the Public Service Board ("Board") issued an Order approving certain compliance filings, including a sound-monitoring plan, submitted by Vermont Wind, LLC ("Vermont Wind").

On October 4, 2010, Ridge Protectors, Inc. ("RPI"), filed a motion to alter the September 20 Order.

In this Order, we deny RPI's motion.

**RPI's Motion**

In its motion, RPI states: "In accordance with Rule 59 E, of Vermont Rules of Civil Procedure, RPI wishes to point out some testimony that the Board may have overlooked concerning the monitoring of noise levels due to the operation of wind turbines." Specifically, RPI raises the following three issues related to the sound-monitoring plan approved in our September 20 Order.

First, RPI contends that the "use of the indoor measurement locations in the ASTM E966-04 standard seriously compromises the protection offered residents near the turbines, by adding 10 or 15 dB to the criteria level." Essentially, RPI contends that the sound-monitoring plan, as approved by the Board, will allow Vermont Wind too much discretion in locating the

microphone to be used in indoor sound monitoring, and, consequently, will allow noise from the turbines to exceed the noise limits established in our August 8, 2007, Order approving the project.

Second, RPI contends that the measurement methodology contained in the noise-monitoring plan is "seriously flawed." In particular, RPI suggests that "most of the data collected will be discarded due to potential contamination from background noises" and that "the most likely result is that the Vermont Wind Noise Reports will state that the majority of the data from many monitoring locations were not usable, in which case the report would be of no value in determining compliance with the Board's Order." RPI asserts that the Board should "specify at least one week of useable data while the turbines are operating."

Finally, RPI "ask[s] that the Board re-examine our recommendation that direct measurement be allowed as a measurement technique."

#### Responses to the Motion

On October 19, 2010, Vermont Wind filed an objection to RPI's motion. Vermont Wind asserts that the Board should deny the motion on procedural grounds because Vermont Rule of Civil Procedure 59(e) "is not intended to permit parties to simply relitigate issues or to allow parties to correct previous tactical decisions."<sup>1</sup>

With respect to RPI's objection to the use of the ASTM standard to determine the location of the indoor microphones, Vermont Wind contends that RPI has raised this issue previously and is now attempting to further develop its position. In addition, Vermont Wind states that the ASTM standard is an established, published standard and RPI's approach could skew the results of the test.

Vermont Wind also maintains that the Board should deny RPI's claim regarding the measurement methodology, as RPI had raised this issue in its initial comments on Vermont Wind's noise-monitoring plan. Vermont Wind further contends that RPI's request should also be denied on the merits, as Vermont Wind has demonstrated that the methodology is sound and

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1. Citing *In re: Vermont RSA Ltd. Partnership*, Docket No. 6651, Order of 10/6/06 at 2.

allows for additional time for noise measurement if turbines are not operational during the measurement process.

With respect to the use of outdoor testing, Vermont Wind again maintains that RPI had previously raised this issue. Vermont Wind also asserts that "direct measurement of interior sound levels, as RPI recommends, will not allow for reliable determination of the Project's sound levels as it does not effectively isolate sound that is only attributable to turbines in an indoor environment."

### Discussion and Conclusion

A motion filed pursuant to V.R.C.P. 59(e) to alter or amend a judgment is left to the discretion of the court.<sup>2</sup> It is a procedural rule that codifies a court's inherent power to "open and correct, modify or vacate its judgments."<sup>3</sup> The purpose of Rule 59(e) is to allow the court to avoid the unjust result arising from the mistake or inadvertence of the court and not the fault or neglect of a party.<sup>4</sup> Under Rule 59(e), the Board "may reconsider issues previously before it, and generally may examine the correctness of the judgment itself."<sup>5</sup> The Vermont Supreme Court has long warned that this power of reconsideration "should be used with great caution."<sup>6</sup> It is not intended to permit parties to simply relitigate issues.

When Vermont Wind filed its proposed noise-monitoring plan, every party had the opportunity to file comments on the plan. RPI availed itself of that opportunity and provided substantial comments. RPI's motion to alter is largely a reiteration of those comments that the Board has already rejected. As such, the motion merely seeks to relitigate issues previously

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2. *Gardner v. Town of Ludlow*, 135 Vt. 621 (1973). Rule 59(e) is applicable to Board proceedings pursuant to Vermont Public Service Board Rule 2.105.

3. *Osborn v. Osborn*, 147 Vt. 432, 433, 519 A.2d 1161, 1162-63 (1986).

4. *Id.*

5. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54; 573 A.2d 1188, 1192 (1990) (citations omitted).

6. *Haven v. Ward's Estate*, 118 Vt. 499, 502; 114 A.2d 413, 415 (1955).

decided, and thus is not within the scope of a proper motion to alter under Vermont Rule of Civil Procedure 59(e).

In addition, even if we were to address the arguments presented in RPI's motion, we would reject them because: (1) the use of an objective standard, such as the ASTM-E966-04 standard, is appropriate in determining the location of microphones to be used during indoor noise measurement; (2) Vermont Wind has provided sufficient evidence that the methodology used to measure noise levels is appropriate and will provide sufficient information to determine compliance with the noise standards established by the Board; and (3) measuring noise outside buildings, and accounting for attenuation to determine the noise levels inside the building, is an appropriate method for determining compliance with the noise standards.

For these reasons, we reject RPI's motion.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 11<sup>th</sup> day of February, 2011.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: February 11, 2011

ATTEST: s/ Judith C. Whitney  
Deputy Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*